

ADVISORY ETHICS OPINION 89-01

SYNOPSIS:

Secrets of a former client include information from a source other than the client, which were gained in the course of the lawyer-client relationship; where the lawyer has knowledge of a client's secret, the lawyer must not disclose the secret if the client has requested that secret remain inviolate or if disclosure would otherwise be embarrassing or detrimental to client's interests.

FACTS:

A lawyer requests an opinion regarding the use of information gained in the course of representing a former client ("Client A") in the defense of a present client ("Client B"). The lawyer had been assigned to represent Client B, the mother of a child who had been found to be physically abused by Client B's boyfriend. Subsequently, the child was placed in foster care and was allowed to have unsupervised and supervised visits with Client B, provided that the boyfriend was absent from the home. The State now seeks to terminate Client B's residual parental rights, alleging that the child has been sexually molested by Client B's boyfriend during visitations.

The lawyer had earlier been assigned to represent another mother (Client A) in a child neglect and abandonment case. Client A has moved to another state, and her exact whereabouts are unknown to the lawyer. He has not been able to make contact with her. In the course of his representation of Client A, he acquired information that her child had been briefly placed in the same foster home as the child of Client B. Client A's child was alleged to have been caught performing a sexually inappropriate act on another child in the foster home, possibly Client B's child.

The lawyer believes that this information is relevant and necessary to the defense of Client B, since it could explain the evidence of sexual molestation of Client B's child that forms the basis for the State's petition to terminate Client B's parental rights. If the lawyer were able to use the information, he would contend that it casts doubt on whether Client B's boyfriend is responsible for sexually molesting her child. The lawyer has already submitted interrogatories to the State Department of Social and Rehabilitation Services, asking it to disclose the initials of any child in its custody who was placed at the foster home with Client B's child, and who also showed evidence of sexual deviancy. The State has refused to provide such information, citing statutory confidentiality. The lawyer requests our opinion as to whether he must withdraw from representation of Client B.

SUMMARY AND ANALYSIS:

This case presents a conflict between the commands of the lawyer's zealous advocacy of Client B under DR 7-101 and the preservation of Client A's confidences and secrets mandated by DR 4-101. In order to effectively represent Client B, the lawyer seeks to develop information about the behavior of Client A's child. Even though this information involves the child and not the client herself, it is still a "secret" within the meaning of DR 4-101(A) if it was gained in the course of and as a result of the professional relationship, and either the client has requested that it be held inviolate, or its disclosure would be embarrassing or likely to be detrimental to the client.

It seems clear that the information relating to Client A's child was not independently derived and developed.¹

There is no controlling significance to the fact that the alleged sexually inappropriate behavior of Client A's child occurred in a foster home and not in Client A's presence. If the knowledge about this behavior was acquired from some source completely independent of client secrets or confidences contained in the lawyer's files, or as a result of his memory, then it might be argued that it was not "gained in the professional relationship." In such a case, we have given the opinion that the information may be used in effectively representing a present client.²

However, "secrets", as defined in DR 4-101(A), may be learned from persons or sources other than the client. Thus, as long as the information was obtained during and incidental to the representation of Client A, it may be a "secret" within the meaning of the Code. In the strict sense of agency, a lawyer is acting as a fiduciary for his client, and should refrain from disclosing all information relating to Client A or to the representation of Client A as long as such information is acquired in the course of representation, whether or not it would be embarrassing or detrimental.³ The Code of Professional Responsibility, however, is

¹ Compare *Opinion 88-6*.

² See *Opinion 88-6*.

³ *Restatement (Second) of Agency* §§ 395-396 (1957).

not so strict. Thus, while the ethical considerations accompanying Canon 4 imply a fairly broad obligation to preserve secrets,⁴ the Disciplinary Rules link the lawyer's duty to client instructions that information remain secret, or the lawyer's own determination that its revelation would be embarrassing or detrimental to the client. Since Client A is unavailable, the lawyer cannot conclude that she has requested that the information remain inviolate. If the information otherwise qualifies as a "secret", however, the client's unavailability does not obviate the lawyer's obligation to keep it confidential.⁵

In light of the foregoing, the lawyer must independently determine whether disclosure of the information about Client A's child would be embarrassing or likely to be detrimental to Client A. If either is true, then DR 4-101(B)(1) requires that the lawyer not reveal the information, and that he not use the information to advance the interests of another client. In such case, the lawyer should seek to withdraw.

The lawyer emphasizes the fact that the State has relied upon a confidentiality statute in refusing to provide the information he has requested in his interrogatories. For purposes of resolving his ethical dilemma, however, the emphasis is misplaced. Whether or not a statute imposes a confidentiality requirement that creates an evidentiary privilege for the State, the lawyer's obligation to Client A emanates from a different source, i.e., his lawyer-client relationship. Thus, unless his good faith analysis results in a determination that the information he wishes to use is not a client secret, he is bound by his ethical obligations.

⁴ See, e.g., *E.C. 4-1*

⁵ *Opinion 88-1; ABA Informal Opinion 1301; Ethical Consideration 4-6.*